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IN THE

Supreme Court of the United States

October Term, 1968

No. 586

ROMEO TRUJILLO-M,

Petitioner,

—against—

THE BANK OF NOVA SCOTIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK; FIRST DEPARTMENT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK; FIRST DEPARTMENT

Petitioner prays that a writ of certiorari issue to review the order of affirmance of the Appellate Division, First Department of the Supreme Court of the State of New York and the judgment of affirmance dated and entered on March 26, 1968 in the office of the clerk of New York County, leave to appeal from which was denied by the Court of Appeals of the State of New York by order made July 2, 1968.

Citation to Decision Below

Trujillo v. *Bank of Nova Scotia,* 51 Misc. 2d 689, 273 N. Y. S. 2d 700 affd. 289 N. Y. S. 2d 389. The Supreme Court decision is set forth in the certified copy of the appendix constituting the record in the Appellate Division at pp. A79 to A84 and is annexed hereto.

Jurisdiction

The order of the Appellate Division, First Department of the Supreme Court of the State of New York, affirming an order of the Supreme Court, New York County which granted summary judgment in favor of respondent and against petitioner dismissing petitioner's complaint was made on February 20th, 1968. A judgment on such order of affirmance was entered on March 26, 1968. Leave to appeal from such order and judgment of affirmance was denied by the Court of Appeals of the State of New York by order dated the 2nd day of July, 1968 and is annexed hereto.

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. A. Section 1257(3).

Petitioner having asserted below and asserts here that he has been deprived of his rights secured by the Constitution of the United States; that N. Y. Banking Law, Sec. 204a(3)(a) is unconstitutional if construed to be retrospective and that it is also repugnant to the laws of the United States.

Questions Presented

1. Is the N. Y. Banking Law, Sec. 204a(3)(a) unconstitutional with respect to or inapplicable to bank deposits made before its passage because it is violative of the "Due Process" Clause of the 14th Amendment to the U. S. Constitution?

2. Does the N. Y. Banking Law, Sec. 204a(3)(a) conflict with the Foreign Assistance Act of the United States (22 U. S. C. A. 2370)?

3. Has the State Court herein decided this case in a manner which is in conflict with the meaning and intent to be given the *Sabbatino case* (376 U. S. 398), thus confusing existing Federal Law with respect to the "Act of State Doctrine"?

4. Is the N. Y. Banking Law, Sec. 204a(3)(a) unconstitutional because it is in violation of "Equal Protection of the Laws" Clause of the 14th Amendment to the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. The case involves the "Due Process Clause" and the "Equal Protection of the Laws" Clause of the First Section of the Fourteenth Amendment to the Constitution of the United States.

2. The case involves the following statute of the State of New York:

a) N. Y. Banking Law, Sec. 204a(3)(a) which reads as follows:

"(a) ... . any foreign banking corporation doing business in this state under a license issued by the superintendent in accordance with the provisions of this chapter shall be liable in this state for contracts to be performed at its office or offices in any foreign country, and for deposits to be repaid at such office or offices, to no greater extent than a bank, banking corporation or other organization or association for banking purposes organized and existing under the laws of such foreign country would be liable under its laws. The laws of such foreign country for the purpose of this subdivision shall be

deemed to include all acts, decrees, regulations and orders promulgated or enforced by a dominant authority asserting governmental, military or police power of any kind at the place where any such office is located, whether or not such dominant authority be recognized as a de facto or de jure government."

* * * * *

3. The case involves the following statute of the United States:

a) The Foreign Assistance Act as amended in 1964 (22 U. S. C. A. 2370) which reads as follows:

"(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case

by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

Statement of the Case

Petitioner was formerly a resident of the Dominican Republic. He was related to Rafael L. Trujillo Molina, its president. He was not engaged in politics and had no political office. He was a businessman and as such, over the years, had been involved in various business and real estate activities which brought him substantial assets and a substantial estate. In 1928 or 1929 he opened an account with the respondent in its Santo Dominican branch. The account was maintained continuously until the overthrow of the government in May 1961, at which time petitioner as well as many other people who were not favored by the incoming military regime, fled the country. Petitioner came to Florida where he is now a resident. Thereafter and until December of 1961, he issued checks drawing funds upon the defendant bank in various amounts which checks were honored. On November 27, 1961, he drew a check in the amount of $25,000. which was dishonored. *Thereafter* and on December 29, 1961, the constitution of the Dominican Republic was amended enlarging the grounds upon which confiscation of property by the state may be effected. In accordance with this constitutional amendment and on January 4, 1962, a statute was passed by which the property of a great many individuals was confiscated, which, without distinction included all relatives to the 4th degree of consanguinity. Confiscation included the property of the petitioner. All of the real estate of the petitioner was so confiscated as well as other business interests. However, in addition to confiscating the property of the peti-

tioner, the Dominican Republic made a demand upon the respondent bank to pay to the government the amount by which it was indebted to the petitioner. Without further action, Court order or challenge, the respondent made such payment.

There was no "act, decree, regulation . . . or order." There was no "promulgation or enforcement" of anything. There was nothing more than a letter and the payment was made.

Under the Constitution in effect on December 29, 1961, confiscation of property of a private individual was permitted only for certain crimes such as treason during war time. To be subjected to that penalty the accused must be tried and the facts established to justify the confiscation. On December 29th the constitution was amended adding another ground—where a public official usurped the power of his office to enrich himself or his relatives and friends, his property could be confiscated.

Petitioner submitted the affidavit of a distinguished member of the bar of the Dominican Republic as to the meaning of the amendment and its applicability to the case at bar. He concluded:

1. Confiscation applies only as to the property of one in office;
2. There would have to be a trial and a finding of guilt as to the person accused;
3. No litigation was ever instituted against the petitioner and no finding that he usurped or abused anything;
4. Petitioner never held public office;
5. The confiscatory statute passed pursuant to the amended constitution merely recited that *some* rela-

tives enriched themselves without finding which ones did in accordance with the provisions of the constitution;

6. The Francisco decision in the Dominican Republic does not apply since that case was against the government and merely sought to declare the statute itself void. It did not seek to establish the claim that it had no application in the case of the petitioner. No facts were set forth in that case to justify the conclusion that it did not apply to the petitioner.

The uncontroverted facts in the within case shows petitioner was never in politics; he amassed his wealth long before the rise to power of Rafael L. Trujillo Molina and that he never received any of his money from the government.

How the Questions Were Raised and Decided Below

There was no trial of any of the issues herein. Respondent moved for summary judgment which motion was granted. The Appellate Division of the Supreme Court of the State of New York affirmed such decision without rendering any opinion. Leave to appeal to the Court of Appeals was also denied without opinion. All of the questions presented herein were raised for the first time on the motion for summary judgment in both the affidavits and briefs of both sides. The same issues were then argued in the Appellate Division.

REASONS FOR GRANTING THE WRIT

POINT I

N.Y. Banking Law Sec. 204a (3)(a) is either inapplicable to or unconstitutional with respect to bank deposits made before its passage.

The lower Court ruled that it was prohibited from consideration of the claim of the plaintiff by reason of the provisions of §204a (3)(a) of the N.Y. Banking Law.

The section, in substance, states that a foreign banking corporation shall be held liable here on contracts to be performed in a foreign country to no greater extent than a bank would be liable under the laws of that foreign country. It is urged that this Statute was misconstrued by the Courts and that it does not preclude recovery in this case.

A. *The Section is unconstitutional with respect to prior bank deposits*

Retroactive laws impairing the obligation of contracts are unconstitutional.

> *Bay* v. *Gage,* 36 Barb 447;
> *California Fed. Savings* v. *Allen,* 112 P. 2d 959;
> *Kentucky Utilities* v. *Carlisle,* 131 S.W. 2d 499;
> *Anderson* v. *Board of Education,* 61 N.E. 2d 562;
> *Yaffe* v. *International Co.,* 80 So. 2d 910;
> *State* v. *Caldwell,* 178 S.W. 2d 624, 151 A.L.R. 1410.

In the absence of such clear statement that the statute is retroactive it will be construed to have no retrospective effect.

Lavieri v. *Ulysses,* 180 A. 2d 632;
Herrick v. *Saylor,* 245 F. 2d 171;
Conn v. *Young,* 677 F. 2d 725;
Field v. *Witt Tire,* 220 F. 2d 74;
Theodosis v. *Keishin Motor,* 92 N. E. 2d 794.

In the present case the rights of the parties were determined at the time petitioner opened up his bank account with the respondent in 1928 or 1929. Deposits and withdrawals over the years did not change that relationship. The N.Y. Banking Law §204a (3)(a) was not passed until 1941. It must be presumed to have only prospective effect with no effect upon rights which were fixed years before. A contract will be upheld wherever possible. This is the rule amongst almost all civilized nations.

Bartolus, Conflict of Laws, pp. 30-2;
Corbin, Contracts, §546;
Allgemeines Landrecht Fur Die Preussischen, I Title 5, §113;
Wharton, Conflict of Laws, 3rd Ed. 1905, §945;
Kossick v. *United Fruit,* 365 U. S. 731;
Pritchard v. *Norton,* 106 U. S. 124;
Abortiz & Co. v. *Price,* 99 Fed. Supp. 602;
Southwestern v. *National Bank of N. Y.,* 6 N. Y. 2d 454.

B. *The section does not apply because respondent would have been liable under Dominican Law*

In defining what it (the section) meant by foreign "laws," it included all acts, decrees, etc., "promulgated or enforced." That did not take place in the present case. There was no "promulgation" of any decree or order of any authority and it certainly was never "enforced." All that happened was that the Superintendent of Banking wrote a letter requesting that the funds on deposit to the credit

of the petitioner be turned over to the State. That was done without objection, without challenge, without court order. The letter request does not come within any of the listed instrumentalities which are "acts, decrees, regulations and orders."

The section provides that a foreign bank may not here be held to greater responsibility than what would have existed in the foreign jurisdiction. The lower Court ignored this question completely and assumed that there was no liability in the Dominican Republic. Since this section attempted to change common law (assuming that it so intended), it must be strictly construed. It did not say that the controlling question was as to what did in fact happen elsewhere. It made the determining question as to what the bank's legal liability was under such foreign laws. What that law was as to the bank's liability in the Dominican Republic was something to be left to a trial.

POINT II

The N.Y. Banking Law Sec. 204a (3)(a) conflicts with the Foreign Assistance Act and is thus void.

The Foreign Assistance Act was amended in 1964 (22 U. S. C. A. 2370) so as to provide that no court may decline to make a decision on the merits "giving effect to the principles of international law . . ." by reason of the Act of State Doctrine. It applies to any "taking after January 1, 1959." There is an exception. This exists when the President determines that the Act of State Doctrine should be applied by virtue of the foreign policy interests of the United States and a certification to that effect must be filed with the court. In the present case this does not exist. In fact, petitioner has filed with his papers a state-

ment of the State Department that it has no interest (letter of February 8, 1965—A72).

Although it is urged that the committee report states that the amendment to the act did not intend to deprive the banks of their ability to use the act of state doctrine as a defense, it is questionable whether the banks are immune from its effects. Statements in the committee were on both sides of this position. It is thus general in its character. Much has been written concerning the *Sabbatino* decision, all of which indicates that it should be confined to the specific facts there involved. Its implications were broad. Andreas F. Lowenfeld, Deputy Legal Advisor for the Department of State, writing in the American Journal of International Law, Vol. 59, about the *Sabbatino* decision said:

> "... and since the statute [Foreign Assistance Amendment] plainly seeks to reverse this ..."

He questioned whether there could be a distinction between a claim to the assertion of title to property and a chose of action saying:

> "... why should there be a difference between an action in the nature of replevin and an action in the nature of damages for conversion."

and again:

> "Finally, does the breach of contract ... give rise to a property claim, as contrasted with a claim for damages? So far as this writer is aware no American Court has poised that question."

He concluded:

> "Thus it is simply not clear whether the statute, as it now stands, does or does not extend to persons who

do not assert title to the specific property before the Court."

If there were no other question in the present application, the writ should issue to permit this question to be answered. The *Sabbatino* case also does not answer the question as to whether the doctrine applies in cases such as this which do not involve "specific property."

Similarly, Prof. Wolfgang Friedman of Columbia University, writing in 34 George Washington Law Review concerning the *Sabbatino* decision stated that the philosophy of international relations urged by the legislature is the principle of "full prompt and adequate compensation. . . ." He then comments:

> "That this view is carried further by the congressional amendment directing the courts not to refuse 'determination on the merits, giving effect to the principles of international law.'"

The statute refers to the requirement that courts must give effect to the principles of international law where it involves a "right of property." It is urged this is general and applies to all "property" including contract rights. That this is so is supported by the exception in the amendment to wit: property acquired by a letter of credit. If there was no intention to cover all property rights including contractual rights there would be no need to exclude from its operation "a letter of credit."

POINT III

The decision below conflicts with the intent of the *Sabbatino* case and distorts its meaning.

The lower court herein has so construed the decision of this Court in the case of *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 that there is a blind acceptance of the act of anyone—governmental agency, a clerk, a private bank or corporation or for that matter almost anyone—just so long as the act takes place in a foreign country. The *Sabbatino* case, *supra*, did not go that far. The "Act of State Doctrine" discussed in the case was more clearly defined under a given set of circumstances. It did not establish a brand new doctrine.

It is important that the nature of the dispute be reviewed to determine whether judicial review is proper.

The most important question which has to be considered in determining whether the judicial will assume jurisdiction of the problem, is that of *title*. This was the thread which ran through the entire *Sabbatino* decision. The case involved, as did others supporting confiscatory decrees, the *actual seizure of property* and thus the question as to the *title* to the property seized arises.

In this case the lower court held there was no distinction between the seizure of property and that of a contractual right. Petitioner contends that the *Sabbatino* case did make a distinction and that in any event the Foreign Assistance Act Amendment reaffirmed petitioners' position on this point.

In the present case, the executive branch of the government has no particular interest. It has no stated parties.

The Courts have, since the *Sabbatino* case, indicated that the doctrine must be restricted to the facts there particularly applicable. The Court referred to this limitation in the *Sabbatino* decision (437) stating that only these facts justify the present conclusion:

> "• • • maintaining the act of state doctrine in this realm of its application."

See also:

> *Victory Transport Inc.* v. *Commisseria Generale*, 336 Fed. 2d 354;
> *Flota Maritinia Browning de Cuba* v. *Motor Vessel Cindad*, 355 Fed. 2d 619.

In the *Flota* case, *supra*, the Court refused to follow the claim urged that the *Sabbatino* case was applicable, stating:

> "Applicability of the act of state doctrine under these circumstances does not necessarily suggest applicability of the doctrine of sovereign immunity to Cuban property arrested in this country, when the Department of State has manifested no interest in it."

Thus it appears that in the *Flota* case there was no seizure of property physically and that the State Department expressed no interest in the confiscatory decree involved.

In the present case all that is involved is a debt, a contractual right. There could be no seizure and title to it is not in question.

POINT IV

N.Y. Banking Law Sec. 204a (3)(a) is unconstitutional as violative of the "Equal Protection Clause" of the 14th Amendment to the Constitution of the United States.

Our common law and our public policy dictates that there shall be just and adequate compensation for the taking of property. In recent times this has not always occurred in foreign countries, in the sense that some administration in power has confiscated the property of its residents or citizens. Principles of international law have been applied by tribunals when issues relating to such confiscation have been submitted to them. A bank was in no different position than any other entity appearing before such tribunal. This section seeks to alter this concept. It places the bank in a favored status, even though it is mandatory under our constitution that all be treated alike.

The situation becomes more complex in light of the fact there is nothing that anyone "seizes " from a bank. Whose property is it? The bank's or the depositor's? It is thus a simple matter for the bank to just give away money which it labels as belonging to the depositor without regard to its contract with the depositor. No one else is given that privilege under the statute, assuming that it was proper to do so at all.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

MICHAEL M. PLATZMAN
Counsel for Petitioner

APPENDIX

Opinion of Saypol, *J.*

SUPREME COURT

NEW YORK COUNTY

[SAME TITLE]

Defendant The Bank of Nova Scotia moves for an order dismissing the complaint for failure to state a cause of action (CPLR 3211[a] 7), or, alternatively, forum non conveniens. Plaintiff Romeo Trujillo cross-moves for an order granting summary judgment in his favor (CPLR 3212).

The parties thus are in accord on the following material facts. Defendant is a Canadian banking corporation authorized to do business in New York. It maintains a branch office in Santo Domingo. Plaintiff is now a resident of Florida. He is the brother of the late Rafael Trujillo Molina, quondam ruler of the Dominican Republic. In the action, he seeks recovery of an alleged credit balance in the sum of $1,737,255, plus interest, in a checking account created and maintained since 1956, with the defendant's Santo Domingo branch. Defendant does not deny the existence of the account or the amount of the debtor-creditor relationship arising therefrom in so far as these facts and resultant legal consequences reflect the circumstances before December 1, 1961. The bank urges consideration of the nature of the contractual rights and obligations of the parties and stresses that the account represented moneys in Dominican currency, the peso, which it was obligated

to repay to the plaintiff only in the Dominican Republic, governed by Dominican law.

The applicable Dominican law was significantly revised following the overthrow and expulsion of the Trujillo regime in the latter part of 1961.

On December 1, 1961, the Superintendent of Banks of the Dominican Republic, by letter to the defendant's Santo Domingo branch, ordered the bank "to completely freeze the funds and securities belonging, without any exception, to the members of the Trujillo family * * *." This directive advised that "[a]s a result of the above freezing, such funds cannot be drawn on or withdrawn, either directly or indirectly, by the depositors thereof."

Submitting to this order, the bank refused to honor checks presented for payment subsequent to the December 1, 1961, date.

Thereafter, on December 29, 1961, the Dominican Constitution was amended to authorize confiscation of property "in case of abuse or usurpation of power, or of any public office for personal enrichment or enrichment of others * * *" (Article 8, par. 9). On January 4, 1962, the Council of State of the Dominican Republic enacted Law No. 5785, confiscating the property of Rafael Trujillo Molina, his widow, and their children (Article 1) and the property of specifically named relatives and associates of Rafael Trujillo Molina, including that of his brother, plaintiff Romeo Trujillo Molina (Article 2). The enactment authorized the General Bureau of Administration, Control and Recovery of Property, "to adopt, all necessary measures for the implementation of this Law" (Article 4; see also, reaffirmation by Law No. 48 "providing the final, unappealable confiscation of the property belonging to the family Trujillo Molina and all its relatives," November 6, 1963). By letter dated January 7, 1962, the Director of Administration,

Control and Recovery of Property directed the Santo Domingo branch of defendant bank "to immediately place at the disposal of the National Treasury, through this General Bureau, all the assets and property of any nature whatsoever now in the possession of your bank, including bank deposits, credits, shares of stock, bonds, &c., belonging to: * * * Romeo Trujillo Molina * * * " "In what concerns any bank deposits," the letter instructed, "the remittance of same shall be made by check of the management issued in favor of the National Treasury * * * "

In accordance with the aforesaid directive, on January 10, 1962, the bank paid the pesos held to the credit of plaintiff's checking account to the Dominican National Treasury.

Plaintiff sues, in the first cause of action, to recover the credit balance as a debt by defendant Canadian banking corporation, and in the second cause of action, for conversion. As one of his postulates supporting right to recovery against this defendant, plaintiff, who for political reasons, cannot return to the Dominican Republic to press his claim, denies that defendant's Santo Domingo branch constitutes a separate entity in so far as the debt or the debtor-creditor relationship is concerned.

On the foregoing facts, the defendant's assertion of forum non conveniens must be rejected, but on the other ground, pursuant to CPLR 3211(a) 7 in conjunction with CPLR 3211(c), defendant's position must be satisfied.

This case, even recognizing that the second cause of action sounds in tort, presents such "special and unusual circumstances" the alternatives of instituting suit in Canada or in the Dominican Republic as to favor "acceptance of the suit" (Taylor v. Interstate Motor Freight System, 309 N. Y. 633, 636; see, as to the first cause of action, Katz v. Liston, 22 A. D. 2d 205; cf. Glendon v. Glendon, 24 A. D. 2d 492).

The second part of defendant's motion raises a more complex question, viz., the legal effect of the confiscation by the Dominican Republic of a Dominican citizen's credit balance in a Santo Domingo branch of defendant bank which paid this balance to the Dominican treasury.

Two factors are determinative to wit, New York Banking Law, section 204-a (3) (a) and decisional precedents which require the application of the act of state doctrine.

Section 204-a (3) (a) of the New York Banking Law provides, in pertinent part:

"(a) * * * *any foreign banking corporation doing business in this state* under a license issued by the superintendent in accordance with the provisions of this chapter *shall be liable in this state for contracts to be performed* at its *offices, in any foreign country, and for deposits to be repaid at such office or offices, to no greater extent than a bank, banking corporation* or other organization or association for banking purposes *organized and existing under the laws of such foreign country would be liable under its laws. The laws of such foreign country for the purpose of this subdivision shall be deemed to include all acts, decrees, regulations and orders promulgated or enforced by a dominant authority* asserting governmental, military or police power of any kind *at the place where any such office is located, whether or not such dominant authority be recognized as a de facto or de jure government.*" (Emphasis supplied).

Obviously, the Dominican constitutional provision, statutory enactment and regulation referred to herein providing for the confiscation of this plaintiff's credit balance constitute the formal law of the Dominican Republic, whatever objections to validity may exist.

Under the act of state doctrine, this court is precluded from testing the validity of the laws in question. The

Supreme Court of the United States in Banco Nactional de Cuba v. Sabbatino (376 U. S. 398, 428) has held that "The Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." "We are constrained," the court stressed (376 U. S., at 425), "to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."

Without further elaboration of the United States Supreme Court's pronouncement with regard to the act of state doctrine as "federal law," it should be noted that the Court of Appeals of New York had, even prior to Banco Nactional de Cuba v. Sabbatino (376 U. S. 398), declared that "The courts of one independent government will not sit in judgment upon the validity of the acts of another done within its own territory, even when such government seizes and sells the property of an American citizen within its boundaries" (Salinoff & Co. v. Standard Oil Co., 262 N. Y. 220, 224). It is remembered that the plaintiff is not an American citizen.

Conformably, the liability of the defendant bank is pursuant to Banking Law, section 204-a (3) (a), to be determined by the liability of its Santo Domingo branch under Dominican law. Plaintiff fails to demonstrate that such liability was not fully extinguished upon payment to the National Treasury of the Dominican Republic of the credit balance

then owed to plaintiff (see decision by Dominican Republic Supreme Court of Justice denying appeal from confiscation by Dr. Francisco Nicolas Savinon Trujillo, decided December 14, 1964; defendant's exhibit.)

Nor in the view of the 1965 amendment of the so-called "Sabbatino Amendment" (Foreign Assistance Act of 1964 as amended by the Foreign Assistance Act of 1965, 19 Stat. 653, 22 U. S. C. sec. 2370 [e] [2]) need this court become embrolled in the many questions raised by the Act of Congress, in modification of the holding in Banco Nacional de Cuba v. Sabbatino (376 U. S. 398), that "* * * no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law. * * *" The report of the Committee on Foreign Relations on the Foreign Assistance Act of 1965 (S. Rep. No. 170 89th Cong., 1st session 1965), at page 19, explains that the purpose of the amendment was "to make it clear that the law does not prevent banks * * * from using the act of state doctrine as a defense to multiple liability upon any contract or deposit * * * where such liability has been taken over or expropriated by a foreign state * * *." (See Friedmann, National Courts and the International Order: Prospections on the Implications of the Sabbatino Case, 34 George Washington Law Review, 443 [March 1966]; Lowenfeld, The Sabbatino Amendment-International Law Meets Civil Procedure, 59 American Journal of International Law, 899, 903 [1965].)

That part of defendant's motion for an order, pursuant to CPLR 3211 (a) 7, dismissing each cause of action of the complaint, is granted. Plaintiff's cross-motion for an order, pursuant to CPLR 3212, granting summary judgment in his favor is denied.

Settle order.

Order of Court of Appeals Denying Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Second day of July A. D. 1968.

PRESENT,

HON. STANLEY H. FULD,
Chief Judge, presiding.

Mo. No. 578

ROMEO TRUJILLO-M,
Appellant,

vs.

THE BANK OF NOVA SCOTIA,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

[SEAL]

A copy

GEARON KIMBALL
Deputy Clerk

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IN THE

Supreme Court of the United States

October Term, 1968

No. 586

ROMEO TRUJILLO-M,

Petitioner,

—against—

THE BANK OF NOVA SCOTIA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK; FIRST DEPARTMENT

MICHAEL M. PLATZMAN
Counsel for Petitioner
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BLATT PRESS, 445 GREENWICH STREET, NEW YORK, N. Y. 10013 WO 6-5529

Judgment of Affirmance

SUPREME COURT

NEW YORK COUNTY

Index No. 251/66

ROMEO TRUJILLO-M,

Plaintiff,

—against—

THE BANK OF NOVA SCOTIA,

Defendant.

A motion having been made herein by the defendant The Bank of Nova Scotia against the plaintiff Romeo Trujillo-M for summary judgment and plaintiff having cross-moved for summary judgment against defendant, and said motions having come on to be heard before Hon. Irving H. Saypol, at Special Term, Part I, of the Supreme Court, New York County, on the 31st day of March, 1966, and the Court, after due deliberation having granted defendant's request for summary judgment against the defendant, and an order having been duly signed by the Court, and entered in the Office of the Clerk of the Supreme Court, New York County on the 20th day of October 1966, dismissing plaintiff's complaint, and a judgment thereon having been entered in the Office of the Clerk of New York County on the 3rd day of November, 1966, and an appeal having been taken by the plaintiff from said judgment to the Appellate Division, First Department, pursuant to a notice of appeal dated November 10, 1966, and said appeal having come before the Appellate Division, First Depart-

ment, on the 2nd day of February 1968, the Appellate Division, First Department, after due deliberation by an order dated the 20th day of February 1968 having unanimously affirmed the order and judgment appealed from dismissing plaintiff's complaint, and having granted defendant-appellant Nova Scotia $50.00 costs on the appeal, and the remittitur of the Appellate Division, First Department having been filed herein,

Now, on motion of Shearman & Sterling, attorneys for the defendant The Bank of Nova Scotia, it is

ADJUDGED that the judgment so appealed from be and the same is hereby in all things affirmed, and it is further

ADJUDGED that the defendant, The Bank of Nova Scotia, located at 37 Wall Street, New York, New York, recover of plaintiff Romeo Trujillo-M, residing in the County of Dade, State of Florida, the sum of $644.10 costs and disbursements as taxed and that defendant have execution therefor.

JUDGMENT signed and entered this 26th day of March, 1968.

JAMES MCGURRIN
Clerk

FILED
Mar. 26, 1968
N. Y. County Clerk's Office

Order of Affirmance on Appeal from Order and Judgment

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 20th day of February, 1968.

Present—

HON. HAROLD A. STEVENS,
Justice Presiding

" ARON STEUER,
" GEORGE TILZER,
" BENJAMIN J. RABIN,
" EARLE C. BASTOW,

Justices.

ROMEO TRUJILLO-M,

Plaintiff-Appellant,

—against—

THE BANK OF NOVA SCOTIA,

Defendant-Respondent.

An appeal having been taken to this Court by the Plaintiff-appellant from an order of the Supreme Court, New York County, entered on the 20th day of October, 1966, denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment dismissing the complaint and from the judgment entered in the office of the Clerk of the County of New York on the 3rd day of November, 1966, and said appeal having been argued by

Order of Affirmance on Appeal from Order and Judgment

Mr. Michael M. Platzman, of counsel for the appellant, and by Mr. Henry Harfield, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the order and judgment so appealed from be and the same are hereby, in all things, affirmed; and that the respondent recover of the appellant $50 cost of this appeal.

Enter:

HYMAN W. GAMSO
Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 586

ROMEO TRUJILLO-M,

Petitioner,

v.

THE BANK OF NOVA SCOTIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

HENRY HARFIELD
Attorney for Respondent
20 Exchange Place
New York, New York 10005

SHEARMAN & STERLING
PETER S. NESS
Of Counsel

In the

Supreme Court of the United States

No. 586

Romeo Trujillo-M,

Petitioner,

v.

The Bank of Nova Scotia,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The decision of the Supreme Court, New York County, is reported at 51 Misc. 2d 689, 273 N.Y.S. 2d 700 and is set forth at pages 1a-6a of the Appendix to the Appendix to the Petition.* The decision was unanimously affirmed without opinion by the Appellate Division of the Supreme Court, First Department, in an order reported

* Except as otherwise noted, figures in parentheses refer to pages of the Appendix and Supplemental Appendix to the Petition.

at 289 N.Y.S. 2d 389. The Appellate Division and the Court of Appeals of the State of New York denied motions for a further appeal to the Court of Appeals. The orders on these two motions are not reported; the Order and Judgment of the Appellate Division are set forth at pages 9a-12a of the Supplemental Appendix to the Petition; the order of the Court of Appeals is set forth on page 7a of the Appendix to the Petition.

Questions Presented

For the reasons hereafter set forth in the Argument, respondent believes and respectfully submits that the petition presents no questions appropriate for review by this Court.

Statement

Petitioner's Statement of the Case (Petition pages 5-7) repeats factual contentions that are inconsistent with the record and the facts found by the Supreme Court of New York. The New York Supreme Court found the following facts to be undisputed.

Petitioner, a citizen of the Dominican Republic, residing in Florida, brought suit in the Supreme Court of the State of New York against respondent, a Canadian banking corporation, to recover the sum of $1,737,255 with interest. Respondent is licensed to do business in New York and also maintains a branch office in the Dominican Republic. While a citizen and resident of the Dominican Republic, petitioner opened an account with respondent's branch in that country. The account was in pesos, the currency of the Dominican Republic, and was established, maintained, and operated under, in accordance with, and subject to the laws of the Dominican Republic.

Petitioner is the brother of the late Rafael Trujillo Molina, quondam dictator of the Dominican Republic.

Following the overthrow of the Trujillo regime in the latter part of 1961, the Superintendent of Banks of the Dominican Republic ordered the respondent's Dominican branch to "freeze the funds and securities belonging, without any exception, to the members of the Trujillo family", including the petitioner, and thereafter, pursuant to Dominican law authorized by amendment of the Dominican Constitution, the property of the petitioner (including the bank account in question) was confiscated and the respondent's Dominican branch was directed to and did pay over to the Dominican national treasury the balance then standing to the credit of petitioner's account with respondent's said branch in the Dominican Republic.

The New York Supreme Court held that the confiscation of petitioner's account with respondent's Dominican branch was an act of state executed by the Dominican Republic within its own territory that, under Dominican law, extinguished respondent's liability to petitioner for that account. The Supreme Court of New York further held that the so-called "Sabbatino Amendment" to the Foreign Assistance Act of 1964 did not prevent respondent from using the act of state doctrine as a defense to multiple liability upon a deposit that had been taken over by a foreign state (6a). Accordingly, on the basis of Section 204-a (3)(a) of the New York Banking Law and decisional precedents, the New York court dismissed the causes of action alleged by the petitioner and granted summary judgment in favor of the respondent This determination was unanimously affirmed without opinion by the Appellate Division of the Supreme Court of New York and leave to appeal to the New York Court of Appeals was denied by the Appellate Division and by the Court of Appeals on separate applications.

ARGUMENT

I.

The validity of section 204-a (3)(a) of the New York Banking Law is not drawn in question by the decision of the New York court.

The legal effect of the act of state fully executed by the Dominican government within its territory was to discharge the respondent bank from its liability on the bank account maintained by the petitioner in the Dominican Republic. The decisions of this Court as well as of the highest court of the State of New York thus constrained the New York court to dismiss the action below.

Banco Nacional de Cuba v. *Sabbatino,* 376 U.S. 398 (1963)

Oetjen v. *Central Leather Co.,* 246 U.S. 297 (1918)

Underhill v. *Hernandez,* 168 U. S. 250 (1897)

M. Salimoff & Co v. *Standard Oil Co.,* 262 N.Y. 220, 186 N.E. 679 (1933)

Dougherty v. *Equitable Life Assurance Society,* 266 N.Y. 71, 193 N.E. 897 (1934)

No contrary result is dictated by the Foreign Assistance Act of 1964, as amended (See p. 7 *infra*).

The Supreme Court of New York found that section 204-a(3)(a) of the New York Banking Law restated decisional law in statutory language, saying:

> "Conformably, the liability of the defendant bank is pursuant to Banking Law, section 204-a(3)(a), to be determined by the liability of its Santo

> Domingo branch under Dominican law. Plaintiff fails to demonstrate that such liability was not fully extinguished upon payment to the National Treasury of the Dominican Republic of the credit balance then owed to plaintiff . . ." (5a-6a)

The New York court expressly stated that "Two factors are determinative to wit, New York Banking Law, section 204-a(3)(a) and decisional precedents which require the application of the act of state doctrine" (4a) As the court held that the petitioner had failed to state a cause of action under the controlling decisions of this Court and of the courts of New York, its ruling on the merits cannot be said to depend on Section 204-a(3)(a), and the validity of that State statute is not drawn into question. Petitioner has thus failed to meet the requirements of 28 U.S.C. Section 1257(3) and the petition should be denied.

II.

Section 204-a (3)(a) of the New York Banking Law is a statute of general application that codifies the New York choice of law rules, defines the jurisdiction of New York courts, and is not repugnant to the Constitution, treaties or laws of the United States.

In substance Section 204-a(3)(a) provides that in an action on a contract governed by foreign law, the New York courts will apply the foreign law and will not provide a remedy that is inconsistent with the result prescribed by such governing foreign law. The section thus is in no way repugnant to the constitutional provisions prohibiting the impairment of contracts and guaranteeing equal protection of United States law. These constitu-

tional provisions simply have no application to Section 204-a(3)(a) of the New York Banking Law.

Petitioner, a non-resident of the State of New York, has brought an action against the respondent bank, a Canadian corporation, for alleged breach of a contract made and to be performed in the Dominican Republic, under and in accordance with the laws of the Dominican Republic. Under the New York choice of law rule, the law to be applied by the New York court is that of the Dominican Republic.

Auten v. *Auten*, 308 N.Y. 155, 124 N.E 2d 99 (1954)

Richard v. *American Union Bank*, 241 N. Y. 163, 149 N.E. 338 (1925)

Section 204-a(3)(a) is an explicit statutory statement of New York doctrine and limits the remedial jurisdiction of the New York courts accordingly.

It is apparent that, so far from impairing the obligation of a contract, the section simply states the public policy of New York, namely, that in a suit on a foreign contract the New York courts are not available to provide any remedy other than such, if any, as would be available under the laws of the place where the contract was made and to be performed. The New York court found that respondent was discharged of liability under Dominican law (4a-6a), and so properly dismissed the action. See also: *Zimmerman* v. *Sutherland*, 274 U.S. 253 (1927).

III.

The Foreign Assistance Act has no application to the case at bar.

As indicated above, the decision of the New York court, conformable to section 204-a(3)(a) of the New York Banking Law, and to decisional precedent, was that the New York courts lacked jurisdiction to afford a remedy to the petitioner where the governing law of the contract afforded no such remedy. Quite clearly, the so-called "Sabbatino Amendment" to the Foreign Assistance Act of 1964, neither had nor was intended to have the effect of directing the courts of a State to assume a remedial jurisdiction in contravention of the State's public policy enunciated by the State legislature.

Moreover, the inapplicability of the "Sabbatino Amendment" to the issue between petitioner and respondent was emphatically expressed by the Congress itself. The Committee on Foreign Relations of the United States Senate said:

> ". . . the law does not prevent banks, insurance companies, and other financial institutions from using the act of state doctrine as a defense to multiple liability upon any contract or deposit or insurance policy in any case where such liability has been taken over or expropriated by a foreign state. In such cases, it is not intended to affect any defense previously available to such institution."
>
> (Senate Report #170 on the Foreign Assistance Act of 1965, April 28, 1965, page 19)

Accordingly, neither the New York Banking Law nor the decisional precedents are inconsistent with, or indeed,

affected by the Foreign Assistance Act of 1964, as amended. The petition fails to meet the requirements of 28 U.S.C. Section 1257(3).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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SHEARMAN & STERLING
PETER S. NESS
Of Counsel